Editorial

Preparing for the Future

In March 2018, EU Commissioner for Competition Margrethe Vestager announced the set-up of a panel of three experts to advise her on the key upcoming digital changes affecting markets and consumers, and on their implications for competition policy. The special advisors - CoRe editorial board member Professor Heike Schweitzer, Professor Jacques Crémer, and Assistant Professor Yves-Alexandre de Montjoye - are working on a report to be delivered by 31 March 2019.¹ In January 2019, the European Commission is also organising a conference to discuss the topic with a broad variety of contributors.

Given that the current Commission has already entered the final year of its mandate, Vestager's initiative could be seen as her attempt to shape the enforcement agenda of her successor (in case she would not get re-appointed for another term).

For those anticipating the special advisors' recommendations, it is worthwhile having a look at the findings of a recent academic report reflecting on the implications of digitisation for German competition law enforcement, particularly against abuse of market power.² This report, commissioned by the German Ministry for Economic Affairs and Energy, was also co-authored by Professor Schweitzer. One of its most thought-provoking proposals relates to merger control. The report finds that the substantive test, the so-called SIEC-test ('significant impediment of effective competition'), inadequately captures strategies of dominant undertakings to systematically acquire small innovative start-ups with considerable potential to become future rivals. The authors of the report therefore suggest supplementing the SIEC-test to enable the Bundeskartellamt to exceptionally take into account such a purchasing strategy (as demonstrated by previous acquisitions) and its overall effects on competition.

The European Commission appears to identify a similar challenge. One of the panels of its January conference is devoted to the question whether there is scope to apply theories of harm based on a loss of innovation and/or loss of 'potential competition' more often. Whereas the German report does not single out concentrations in the digital economy, the Commission does refer to 'digital mergers' in this context.

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1 European Commission, 'Commission appoints Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers to Commissioner Vestager on future challenges of digitisation for competition policy' (28 March 2018) <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/commission-appoints-professors-heike-schweitzer-jacques-crémer-and-assistant-professor-yves_en> accessed 26 November 2018.

2 An English summary of the report's main recommendations is available at <<https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.html>> accessed 26 November 2018.

Concerns about powerful incumbents gobbling up potential competitive threats are not novel and come into play in multiple sectors, but they have recently been raised most prominently in relation to the five major tech companies - Google, Facebook, Amazon, Microsoft, and Apple.³ Classical examples include Google's acquisition of YouTube, DoubleClick, and Waze; Facebook's acquisition of Instagram, Oculus VR, WhatsApp, and tbh; and Amazon's acquisition of Diapers.com and Zappos.

Arguably, often such acquisitions do not raise significant competition issues, at least not right away. The ability of start-ups to sell to an incumbent motivates investment and thus inherently spurs innovation. Yet in some instances, there are legitimate concerns about the loss of potential competition and innovation. Identifying such cases, however, poses significant difficulties.

Firstly, traditional product market definition will often lead competition authorities astray since potential for future competition will typically originate in adjacent, niche markets. The assessment of the 2012 concentration between Facebook and Instagram by the US Federal Trade Commission and the UK Office of Fair Trading (OFT) is a case in point. The assessment of both authorities focused on the market for photo-taking and photo-editing apps, where the merged entity would still face significant competition. The OFT even discarded the potential for a competitive relationship between the two parties in online advertising because Instagram did not generate revenues from advertising at that time.⁴

The European Commission's recent assessment of Apple's acquisition of Shazam invites similar criticism. The parties submitted that the concentration was motivated by Apple's desire to enrich its services with Shazam's music and visual recognition features. The competitive assessment, however, focused almost exclusively on the undertaking's limited horizontal overlaps in the markets for digital streaming services and the licensing of music data.⁵

To better capture broader and potential competitive relationships, some commentators have suggested to replace the lens of narrowly defined, functional market definitions with other metrics.⁶

Secondly, it is inherently challenging for competition authorities to identify concentrations that may lessen potential competition. To overcome the information asymmetries between the acquirer and the authority, more extensive use could be made of in-

3 See eg Hal Singer, 'Inside Tech's "Kill Zone": How to Deal With the Threat to Edge Innovation Posed by Multi-Sided Platforms' (*ProMarket*, 21 November 2018) <<https://promarket.org/inside-tech-kill-zone/>> accessed 26 November 2018; Noam Smith, 'Big Tech Sets Up a "Kill Zone" for Industry Upstarts' *Bloomberg* (7 November 2018) <<https://www.bloomberg.com/opinion/articles/2018-11-07/big-tech-sets-up-a-kill-zone-for-industry-upstarts>> accessed 26 November 2018; 'American tech giants are making life tough for startups' *The Economist* (2 June 2018) <<https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups>> accessed 26 November 2018.

4 Anticipated acquisition by Facebook Inc of Instagram Inc (Case ME/5225/12) OFT decision of 14 August 2012.

5 *Apple/Shazam* (Case COMP M.8788) Commission decision of 6 September 2018.

6 See eg Tim Wu, 'Blind Spot: The Attention Economy and the Law' (forthcoming) *Antitrust Law Journal*.

ternal documents, market actions and reactions by the incumbent, and past transactions signalling a defensive “killer acquisition” motive.⁷ This is where the proposal for the amended SIEC-test by the German report fits in.

The proposal to subject dominant (tech) undertakings to stricter merger control is controversial but is certainly worthy of further discussion. One notable practical objection would be that it risks injecting an abuse of a dominant position assessment into merger control proceedings, subject to strict and short deadlines.

Competition law challenges arising from the digital world are also at the heart of the first contribution in this issue. In *The SSNIP Test and Zero-Pricing*, Daniel Mandrescu examines the complexities of defining the relevant market in (future) cases involving online platforms. András Tóth discusses how national competition authorities can more easily and rapidly adapt to a fast-changing world. And in *Hospital Mergers and the Incorporation of Non-Competition Concerns*, Nicole Rosenboom explores how public interest concerns such as affordability, quality of care, and access to care can be taken into account in the assessment of hospital mergers.

The reports section of this issue provides an update of the latest competition law and regulatory law developments at the national level (Belgium, Ireland, Norway, and Sweden) as well as a commentary on the European Commission’s proposal for a Directive on Unfair Practices in the Food Supply Chain. We also have a case note on the General Court’s judgment in *Goldman Sachs* and its implications for the doctrine of parental liability under EU competition law. Finally, this issue includes book reviews of Jenny Leahy’s *Dawn Raids Under Challenge* and Pablo Ibáñez Colomo’s *The Shaping of EU Competition Law*.

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⁷ See eg John Kwoka, ‘Reviving merger control: a comprehensive plan for reforming policy and practice’ (American Antitrust Institute, 9 October 2018) <<https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf>> accessed 26 November 2018; Carl Shapiro, ‘Antitrust in a time of populism’ (forthcoming) *Journal of Industrial Organization*.